

Linda Lewis and Roger Weekly, Individually and as a Partnership, d/b/a Iron Griddle Restaurant and Lynette Ferrari. Case 6-CA-28767

March 31, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On November 6, 1998, Administrative Law Judge James L. Rose issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and a motion to admit additional evidence. The General Counsel filed an answering brief in opposition to the Respondent's exceptions and an opposition to the Respondent's motion. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

We deny as untimely the Respondent's motion to submit the transcript of the hearings dated March 19, 1997, and April 10, 1997, before the Unemployment Compensation Referee. We do, however, take judicial notice of the Opinion of the Commonwealth Court of Pennsylvania in *Ferrari v. Unemployment Compensation Board* upholding the latter body's denial of benefits to the charging party in the instant case.² We find that although the determination of that forum is entitled to consideration, it is not binding on the Board when, as here, the issues differ. *Trayco of S.C.*, 297 NLRB 630, 636 (1990).

We remanded this case to the judge to reconsider his credibility findings in view of his misstatement that Linda Lewis, the Respondent's majority partner, had not raised as a defense before the Pennsylvania Unemployment Compensation Board her claim that insubordination had been a reason for the discharge of Lynnette Ferrari, the charging party. The judge, after reviewing the record, found that although Lewis offered that defense in the hearing before the Commonwealth, it was not credible. In support of his credibility determination, he stressed that Ferrari's alleged refusal to meet with Lewis was not raised as a reason for her discharge on any of the

forms Lewis had submitted to the Unemployment Compensation Board in defense of Ferrari's claim. The judge also emphasized that Lewis did not include the alleged act of insubordination on the list of Ferrari's shortcomings that she intended to read to Ferrari when she fired her. The judge further noted that although Lewis had kept an extensive file of notes she had made about Ferrari during the course of her employment, she was unable to produce the written reprimand she claimed to have prepared for the meeting that Ferrari allegedly refused to attend. He reiterated that the timing of the discharge contributed to the incredibility of Lewis's testimony. Specifically, the judge found that the Respondent had offered no plausible explanation for allowing Ferrari to work the entire next day if the discharge decision had been made, as the Respondent claimed, the previous day after her alleged act of insubordination. He also found that the Respondent gave no plausible explanation for Lewis's discussion with Ferrari of Ferrari's claim for additional pay for herself and another employee if the decision had already been made to fire Ferrari. Thus, the judge reaffirmed his conclusion that the Respondent had discharged Ferrari for engaging in protected concerted activity, i.e., pursuit of a pay adjustment for herself and another employee.

We have, as noted earlier, carefully reviewed the record and agree with the judge that the credited testimony does not support the belated rationale the Respondent has offered for dismissing Ferrari. Thus, we affirm the Findings of Fact and Conclusions of Law in the judge's initial decision and adopt the recommended Order in his Supplemental Decision.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Linda Lewis and Roger Weekly, Individually and as a Partnership, d/b/a Iron Griddle Restaurant, Waynesburg, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

David G. Shepley, Esq., for the General Counsel.

Thomas G. Lemons, Esq., of McMurray, Pennsylvania, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was remanded to me by Order of the Board dated July 29, 1998, to reconsider certain credibility resolutions I made in my decision of October 16, 1997.¹

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The Memorandum Opinion was filed on April 22, 1998, before the Board's remand of the instant case to the judge on July 29, 1998. The Respondent did not seek its admission into the record either while the instant case was initially before the Board or while it was before the judge on remand.

¹ Counsel for the General Counsel filed a motion to submit a brief on this remand, to which he attached a brief. Counsel for the Respondent objected and moved that counsel for the General Counsel be sanctioned for having submitted a brief without authorization to do so. Both motions are hereby denied. I have not considered the brief submitted by

As more fully set forth in my initial decision, this matter principally involves the discharge of Lynette Ferrari on January 23, 1997. Early that day Ferrari had approached Linda Lewis, the Respondent's principal partner, to discuss a pay issue on behalf of herself and another employee. On consideration of the whole record, including my observation of the witnesses, I concluded that Lewis terminated Ferrari because of this protected, concerted activity; and I discredited the assertion by Lewis that she had made the discharge decision on January 22.

In addition to a multitude of problems Lewis professed to have had with Ferrari from the time she bought the restaurant in 1995, Lewis testified that the final act meriting termination was Ferrari's refusal to meet with her as directed on January 22.

It is, of course, critical whether the discharge decision was made on January 22 and before Ferrari engaged in the protected, concerted activity. In discrediting Lewis (and crediting Ferrari where there were factual disputes) I relied in part on demeanor. In addition, I stated, with regard to the asserted failure of Ferrari to meet with Lewis on January 22:

However this alleged act of insubordination was not given as a reason on any of the forms Lewis filled out in defense of Ferrari's unemployment compensation nor testified to by Lewis at the unemployment compensation hearing.

The Board found that in fact Lewis did testify about Ferrari's alleged refusal to meet her on January 22. The Board therefore remanded the case that I "reconsider (my) credibility determinations and to prepare a supplemental decision in light of the erroneous basis (I) asserted for discrediting Lewis' testimony."

The statement in my decision that the alleged act of insubordination was not "testified to by Lewis at the unemployment compensation hearing" was probably incorrect. Although a transcript of the proceedings was not offered into evidence, certain portions were read into this record. In answer to a question by the Referee, Lewis said, "I waited until the shift was over and then I wanted to talk to her. I was going to give her a written reprimand." Further, Ferrari did testify in this proceeding that "the first (she) ever knew" about the Respondent's contention that Supervisor Melba Custer (then Nichols) had told her to report to Lewis on January 22 was at the unemployment hearing.

Nevertheless, the rest of my finding concerning this issue was correct—that the refusal to meet was not given as a reason on any of the forms Lewis filled out in defense of Ferrari's unemployment compensation. Further, Lewis offered into evidence a paper on which she had written a list of Ferrari's many faults and which she claims she intended to read to Ferrari on January 23 when discharging her. Not meeting with Lewis on January 22 was not listed. Finally, Lewis testified that her purpose in wanting to see Ferrari on January 22 was to give her a written reprimand she had prepared (or possibly discharge her). She did not produce the written reprimand at the hearing in this case because, she testified, she threw it away, notwithstanding that she kept a file of every other note she had made concerning Ferrari. I do not believe there was ever such a document.

Ferrari testified that near the end of her shift on January 22 she told Custer that she needed to leave promptly at 1 p.m. as she had "some place I have to go. And she said no problem." Ferrari testified that Custer did not tell her to see Lewis after

her shift. This version was corroborated by then cashier Heidi Conrad, who appeared credible, who is no longer an employee of the Respondent and who has no apparent stake in the outcome of this matter. Conrad did testify that earlier on January 22, following appearance at the restaurant by Ferrari's husband, Lewis told her to tell Ferrari she wanted to see Ferrari. In fact Ferrari did meet with Lewis as requested.

It is unclear exactly when the Respondent first raised Ferrari's alleged failure to meet with Lewis as a defense to the unemployment claim (and the allegations here). While Lewis did testify, in answer to a question by the Referee, that she wanted to see Ferrari to give her a reprimand, Ferrari's failure was not addressed in the Referee's decision, suggesting it was not asserted as a defense at that stage. Only at the appeal level was this alleged act of insubordination considered. The appeal panel found this defense credible and dispositive.

Regardless, the fact that Lewis may have testified to this alleged act of insubordination at the unemployment hearing, and raised it as a defense even before the Referee, does not prove it happened. I conclude it did not. I credit Ferrari and Conrad and discredit Lewis and Custer.

Having reviewed the record, I find no basis to revise my evaluation of the demeanor of the witnesses, to reverse my credibility resolutions or to change my ultimate conclusion that Lewis discharged Ferrari on January 23, 1997, because Ferrari wanted to discuss a pay issue on behalf of herself and another employee. Specifically, I discredit Lewis' testimony that she made the decision to discharge Ferrari on January 22, after Ferrari failed to meet with her as directed. I believe this was false testimony offered for the purpose of proving that the discharge decision was made prior to Ferrari having engaged in protected concerted activity on January 23. Again, I base this in part on my perception of Lewis' demeanor, but also on the inherent incredulity of her testimony. For instance, Lewis gave no plausible explanation of why, if the discharge decision was made on January 22, Ferrari was allowed to work a full shift on January 23; or why, as Lewis admitted, she even discussed the pay issue with Ferrari on January 23; or why this alleged act of insubordination was absent from the list of misdeeds Lewis intended to read to Ferrari when discharging her and the unemployment compensation forms.

I therefore adopt and reaffirm the Findings of Fact and Conclusions of Law in my initial decision and recommend that the Respondent be ordered to cease and desist from engaging in the unfair labor practices found and take certain affirmative action designed to effectuate the policies of the Act, including reinstating Lynette Ferrari to her former job, or if that job no longer exists, to a substantially identical position of employment and make her whole for any loss of wages or other benefits she may have suffered in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950) and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).²

ORDER

The Respondent, Linda Lewis and Roger Weekly, Individually and as a Partnership d/b/a Iron Griddle Restaurant, their officers agents, successors and assigns, shall

Counsel for the General Counsel as the only issue on remand concerns reevaluating credibility resolutions.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in concerted activity protected by the National Labor Relations Act.

(b) Threatening employees with discharge should they engage in concerted activity protected by the National Labor Relations Act.

(c) Interfering with employees rights under the National Labor Relations Act by telling them that an employee has been discharged for contacting the National Labor Relations Board.

(d) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Lynette Ferrari immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility involved in these proceedings, the

Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since the date of this Order.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees because they engage in concerted activity protected by the Act.

WE WILL NOT threaten our employees with discharge should they engage in concerted activity protected by the Act.

WE WILL NOT interfere with our employees rights under the Act by telling them that an employee has been discharged for contacting the National Labor Relations Board.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Lynette Ferrari immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position of employment and WE WILL make her whole for any loss of wages or other benefits she may have suffered as a result of our discrimination against her, with interest.

LINDA LEWIS AND ROGER WEEKLY,
INDIVIDUALLY AND AS A PARTNERSHIP,
D/B/A IRON GRIDDLE RESTAURANT

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."